Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

JERRY E. WELLS AND KENNETH R. STEELE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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28 pp

QUESTION PRESENTED

18 U.S.C. 1014 imposes criminal penalties on a person who "knowingly makes any false statement or report * * * for the purpose of influencing in any way the action," *inter alia*, of a federally insured bank. The question presented is whether the materiality of the false statement or report is an element of the offense described by Section 1014.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 63 F.3d 745.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1995. A petition for rehearing was denied on November 2, 1995. App., *infra*, 21a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1014 of Title 18 provides:

Loan and credit applications generally; renewals and discounts; crop insurance.

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers Home Administration, the Rural Development Administration, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act [*sic*], upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more that 30 years, or both.

STATEMENT

Following a jury trial, respondents were convicted in the United States District Court for the Western District of Missouri of conspiring to violate 18 U.S.C. 1014 by making false statements to federally insured banks for the purpose of influencing the decisions of those banks, in violation of 18 U.S.C. 371 (Count One), and of making false statements to the O'Bannon Bank, a federally insured bank, for the purpose of influencing the decisions of that bank, in violation of 18 U.S.C. 1014 (Count Two).[1] Each respondent was sentenced to a two-year term of probation. The court of

[1] Following the close of the evidence, the district court entered judgments of acquittal on two other counts, each of which alleged that respondents had made a false statement to another bank. App., *infra*, 6a.

appeals vacated respondents' convictions and remanded to the district court for retrial. App., *infra*, 20a.

1. In 1986, respondents and Jim Russell jointly purchased a business that leased and serviced copier equipment, and they renamed that business Copytech Systems, Inc. When respondents and Russell purchased the business, they assumed responsibility for more than $8 million in debts, in addition to a serious cash flow problem. To remedy the cash shortage, respondents obtained cash financing for Copytech by assigning, to financial institutions, Copytech's right to future lease payments from customers' copier leases. App., *infra*, 2a-3a.

Beginning in 1987, in order to obtain financing, respondents and Russell conspired together to misrepresent the terms of Copytech's agreements with its customers to federally insured financial institutions.[2] The misrepresentations related to the terms of a particular lease-and-service agreement that Copytech had with customers known as the "Copier Management Program" (CMP). Under that program, Copytech leased copier equipment and provided service and supplies for that equipment in return for a monthly fee covering both the lease payments and the cost of servicing the copiers. Under its financing agreements with banks, Copytech would assign a bank its right to receive customers' monthly fees; in return, the bank would provide Copytech with financing. Copytech would retain the obligation to pay the

[2] Before respondents' trial, Russell pleaded guilty pursuant to a plea agreement to one count of conspiring with respondents to make false statements to federally insured banks in violation of 18 U.S.C. 371, and to three counts of making false statements. App., *infra*, 3a n.1. Russell testified against respondents at trial. *Id.* at 17a.

cost of servicing its customers' copiers as those costs were incurred. App., *infra*, 4a-5a.

Respondents' conspiracy involved deceiving the banks into believing that Copytech did not have any ongoing service obligations to customers. Those misrepresentations were made because two banks had required that Copytech maintain a cash reserve bank account equal to 15% of the value of Copytech's lease contracts. The reserve was designed to insure that Copytech would be able to cover monthly service costs in the event of a customer's default on monthly payments and to protect the banks in the event that Copytech went out of business. To avoid the requirement of maintaining such a reserve account, Copytech altered its contracts with customers to state that the customer alone bore responsibility for service, while entering into separate contract addenda with the customers that shifted responsibility for servicing the leased copy equipment back to Copytech. Copytech then sent the revised leases to the banks from which it was seeking funding, but did not send the banks the service addenda. By withholding the service addenda, Copytech concealed its service and maintenance obligations from the banks, and thereby obtained funding without having to maintain cash reserves to cover service costs. The conspiracy to omit reference to the hidden service costs of CMP contracts formed the principal basis of Count One. App., *infra*, 4a-6a.

Also to obtain financing for Copytech, respondents provided the O'Bannon Bank with unconditional personal loan guarantees purportedly signed by respondents' wives. In fact, respondents had forged the signatures of their wives, who had not given them signature authority. App., *infra*, 6a-7a, 18a. The scheme

to make false representations to the O'Bannon Bank that its financing of Copytech had been guaranteed by respondents' wives formed the basis of Count Two.

2. The district court instructed the jury that the elements of the offense described by Section 1014 are (1) that the bank was federally insured; (2) that the defendant knowingly made or caused to be made a false statement to the bank as alleged in the indictment; and (3) that the defendant made that false statement "for the purpose of convincing the bank to purchase lease contracts." App., *infra*, 22a. The court further instructed the jury that "[a] statement or representation is 'false' when it is untrue when made or effectively conceals a material fact." *Ibid.* The court then instructed that "[t]he materiality of the statement or representation alleged to be false or concealed is not a matter with which you are concerned and should not be considered by you in determining the guilt or innocence of the defendant." *Id.* at 22a-23a. Following Eighth Circuit precedent, see *United States* v. *Ribaste*, 905 F.2d 1140, 1143 (1990), the court itself decided the issue of materiality, and held that the statements had been materially false. App., *infra*, 8a & nn.3-4.

3. The court of appeals vacated respondents' convictions and remanded for a new trial. App., *infra*, 1a-20a. The court of appeals noted that, while the case was pending on appeal, this Court had held, in *United States* v. *Gaudin*, 115 S. Ct. 2310, 2320 (1995), that when materiality is an element of an offense, the defendant's Sixth Amendment right to a jury trial mandates that the jury determine whether that element has been established. The court of appeals held that, in light of *Gaudin*, the district court erred in

deciding the issue of materiality rather than submitting it to the jury. App., *infra*, 7a-9a & n.3.

The court of appeals rejected the argument that, because the term "material" does not appear in Section 1014's definition of the offense, materiality is not an element of that offense. The court of appeals noted that it had previously held that materiality is an element of the offenses described by 18 U.S.C. 1001 and 18 U.S.C. 287, although "neither statute lists materiality as an element of the crime." App., *infra*, 10a (citing *United States* v. *Adler*, 623 F.2d 1287, 1291 n.5 (8th Cir. 1980)).[3] The court of appeals found "no reason to treat § 1014 any differently from the similarly worded §§ 287 and 1001." App., *infra*, 12a. The court of appeals further observed that a majority of the courts of appeals have held that materiality is an element of Section 1014. App., *infra*, 12a. The court rejected the argument that those courts have inquired into materiality in reviewing convictions

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[3] Section 1001 (18 U.S.C. 1001) provides: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both."

Section 287 (18 U.S.C. 287) provides: "Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided by this title."

under Section 1014 in order "to exclude trifles from its coverage," not because materiality is "a statutorily required element of the crime." App., *infra*, 13a. Rather, the court of appeals stated, the canon that "'[w]hen dealing with a pervasive, all-encompassing statute, * * * courts must be extremely careful to insure that reasonable limits are observed'" justifies reading a materiality element into Section 1014. App., *infra*, 13a (quoting *United States* v. *Beer*, 518 F.2d 168, 170 (5th Cir. 1975)).[4]

REASONS FOR GRANTING THE PETITION

The text of 18 U.S.C. 1014 does not include a materiality requirement. The Eighth Circuit's holding that the materiality of the false statement is nonetheless an element of 18 U.S.C. 1014 deepens a longstanding conflict among the circuits on that issue. Reading a materiality element into Section 1014

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[4] The court of appeals rejected respondents' claim that the evidence at trial had been insufficient to establish respondents' guilt. In finding the evidence sufficient to establish that the false statements that formed the basis of Count One were material, the court of appeals held that the fact that banks had required reserve accounts as a precondition to financing the CMP leases "is sufficient to support a finding that the withheld information was material, or in other words, had the capacity to influence the financial institution." App., *infra*, 18a. In finding the evidence sufficient to establish that the false statements that formed the basis of Count Two were material, the court of appeals held that "[t]he fact that O'Bannon Bank asked the defendants to have their wives sign unconditional loan guarantees supports a reasonable inference that personal loan guarantees from the defendants' spouses would have the capacity of influencing the bank." *Ibid.* Because the convictions were vacated, the court of appeals did not have occasion to address the sentencing issues that the government had raised in a cross-appeal. *Id.* at 19a.

also conflicts with this Court's construction of a similarly worded predecessor statute to Section 1014 in *Kay* v. *United States*, 303 U.S. 1, 5-6 (1938), and with the principle that the task of defining the elements of a criminal offense is entrusted exclusively to Congress.

The question whether materiality is an element of Section 1014 has taken on new importance following the decision in *United States* v. *Gaudin*, *supra*, which requires that when materiality is an element of a crime, it must be decided by the jury, not the judge. If the court of appeals' interpretation of that statute is allowed to stand, prosecutors in jurisdictions that have engrafted a materiality element onto Section 1014 will bear the burden at trial of persuading juries that materiality has been established beyond a reasonable doubt, despite the fact that Congress did not include such a requirement in the statute itself. This Court's review is therefore necessary to resolve the circuit conflict on the proper construction of this important federal statute.

1. This Court has often emphasized that "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 114 S. Ct. 1793, 1796 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)); see *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986) ("[I]n determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive."); cf. *United States* v. *Shabani*, 115 S. Ct. 382, 385 (1994) (because overt act is not mentioned in federal drug conspiracy statute, 21 U.S.C. 846, it is not an element of the offense). In

Kay v. *United States*, *supra*, this Court applied that tenet in the context of a predecessor statute to Section 1014. That statute (Section 8(a) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1467(a)), rendered it a crime to make

> any statement, knowing it to be false, or [to] willfully overvalue[] any security, for the purpose of influencing in any way the action of the Home Owners' Loan Corporation or the Board or an association upon any application, advance, discount, purchase, or repurchase agreement, or loan, under this Act * * *.

Kay, 303 U.S. at 3 & n.1. Kay, the second mortgagee of a property on which a loan had been sought from the Home Owners' Loan Corporation, had overstated the amount of her claim against the property in a consent form to accept bonds of the Corporation in full settlement of her debt. *Id.* at 5. On appeal, she challenged her conviction on the ground that her false statements had been immaterial, because "any statement in the consent of a second mortgagee as to the balance due cannot endanger or directly influence any loan made by the Corporation." *Ibid.*

This Court rejected Kay's claim. It held that the materiality of the false statement was not an element of the offense described by Section 8(a):

> It does not lie with one knowingly making false statements with intent to mislead the officials of the Corporation to say that the statements were not influential or the information not important. There can be no question that Congress was entitled to require that the information be given in good faith and not falsely with intent to mislead. Whether or not the Corporation would act favorably on the loan is not a matter which concerns one seeking to deceive by false information. The case is not one of an action for damages but of criminal liability and actual damage is not an ingredient of the offense.

303 U.S. at 5-6.

In all relevant respects, Section 1014 parallels Section 8(a). Both statutes criminalize a knowing false statement to a covered financial institution when the defendant made the false statement "for the purpose of influencing in any way the action" of that institution. Neither statute includes the term "material." The court of appeals' holding that materiality is an element of Section 1014 therefore cannot be squared with *Kay*, or with the absence from the text of Section 1014 of any materiality requirement.

Nothing in the legislative history of Section 1014 suggests that Congress intended materiality to be an element of that offense. Section 1014 was enacted in 1948, and it represented a codification of 13 separate false-statement statutes relating to different financial or credit institutions. *Williams* v. *United States*, 458 U.S. 279, 288 (1982). One of those statutes was Section 8(a). Congress' use of language in Section 1014 that parallels that of former Section 8(a) indicates that Congress expected that the courts would interpret that language as it had been interpreted in *Kay*. See *Williams*, 458 U.S. at 284 (listing elements of Section 1014, and not including materiality). The absence of the term "material" from Section 1014 is particularly significant given Congress' express inclusion of a materiality limitation in other false-statement statutes. See, *e.g.*, 18 U.S.C. 1621 (per-

jury); 18 U.S.C. 1623 (false declarations before grand jury or court); 18 U.S.C. 922(a)(6) (false statement on firearms application); 18 U.S.C. 1033(a)(1) (false statement on insurance application).[5]

2. Based on *Kay*, the Second Circuit has long held that materiality is not an element of Section 1014. See *United States* v. *Cleary*, 565 F.2d 43, 46 (1977), cert. denied, 435 U.S. 915 (1978). The majority of the courts of appeals, however, have held that the materiality of the false statement is an element of Section 1014. See, *e.g.*, *United States* v. *Lopez*, 71 F.3d 954 (1st Cir. 1995); *United States* v. *Ryan*, 828 F.2d 1010, 1013 n.1 (3d Cir. 1987); *United States* v. *Bonnette*, 663 F.2d 495, 497 (4th Cir. 1981), cert. denied, 455 U.S. 951 (1982); *United States* v. *Thompson*, 811 F.2d 841, 844 (5th Cir. 1987); *United States* v. *Spears*, 49 F.3d 1136, 1141 (6th Cir. 1995); *United States* v. *Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992); *Theron* v. *United States Marshal*, 832 F.2d 492, 496 (9th Cir. 1987), cert. denied, 486 U.S. 1059 (1988); *United States* v. *Haddock*, 956 F.2d 1534, 1549

[5] Instead of looking to those statutes, the court of appeals found (App., *infra*, 12a) "no reason to treat § 1014 any differently" from 18 U.S.C. 1001 and 18 U.S.C. 287, which, the court stated (App., *infra*, 11a), have been read to contain an implicit materiality component. The first of the three clauses of Section 1001, however, expressly uses the term "material"; there is reason to question whether materiality is an element of the other two clauses of Section 1001, which do not contain that term, see note 3, *supra* (setting out text of Section 1001); *United States* v. *Gaudin*, 115 S. Ct. 2310, 2320-2321 (1995) (Rehnquist, C.J., concurring). In any event, both Section 1001 and Section 287 are differently worded from Section 1014, and, significantly, neither contains Section 1014's requirement that the defendant must have acted with the "purpose of influencing" the actions of specific covered financial institution.

(10th Cir.), cert. denied, 113 S. Ct. 88 (1992); *United States* v. *Rapp*, 871 F.2d 957, 964 (11th Cir.), cert. denied, 493 U.S. 890 (1989).

Those courts have generally argued that a materiality requirement is necessary to exclude from prosecution under Section 1014 trivial false statements incapable of influencing a bank. See, *e.g.*, *United States* v. *Staniforth*, 971 F.2d at 1358. A similar purpose, however, is already served by Section 1014's distinctive intent requirement, which requires prosecutors to establish not only that the defendant knowingly made a false statement, but that the defendant made the false statement "for the purpose of influencing in any way the actions" of a covered financial institution. 18 U.S.C. 1014. That requirement narrows the scope of Section 1014 to statements that the defendant subjectively believes would prompt the bank to act, an intent that would rarely exist (or be capable of being proved) when the statement made or fact concealed was trivial in character. See *United States* v. *Lopez*, 71 F.3d at 961 (noting that proof of the requisite "purpose of influencing" will usually require an inference from proof of actual materiality); *United States* v. *Thurnhuber*, 572 F.2d 1307, 1309 n.1 (9th Cir. 1977) ("[a]n individual is not likely to provide immaterial and unimportant information in the hope of influencing a bank's action"); *Staniforth*, 971 F.2d at 1537-1538. There is no reason to conclude that Congress intended an additional, implicit materiality requirement to serve the same purpose.

3. Before this Court's decision last Term in *Gaudin*, the view held by most courts of appeals that Section 1014 contains an implicit materiality element had limited practical significance. That was because almost every court of appeals had also held that the

issue of materiality was to be resolved by the district court itself. District courts routinely held in cases brought under Section 1014 that the materiality element had been satisfied. Moreover, because the appellate cases holding that the materiality of a false statement is an element of Section 1014 typically held that the false statements in question had been material, the United States had little occasion to ask this Court to review those holdings. See cases cited at page 12, *supra*.

Following *Gaudin*, however, as the court of appeals recognized, when the materiality of a false statement is an element of a statute, it is now for the jury to resolve that issue. App., *infra*, 8a-9a. In light of that development, the decisions incorrectly treating the materiality of a false statement as an element of the Section 1014 offense have far greater practical importance. The government will now be obliged to persuade juries, beyond a reasonable doubt, of the existence of an element that Congress did not require for conviction under Section 1014.[6]

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[6] The decisions holding that materiality is an element of Section 1014 may also carry over to prosecutions under similarly worded federal statutes that punish the making of a false statement "for the purpose" of influencing official actions in a variety of benefit programs, although those statutes, like Section 1014, lack any express materiality limitation. See 15 U.S.C. 645 (relating to the Small Business Administration); 15 U.S.C. 714m (Commodity Credit Corporation); 18 U.S.C. 1007 (Federal Deposit Insurance Corporation); 18 U.S.C. 1010 (Department of Housing and Urban Development and Federal Housing Administration); 18 U.S.C. 1026 (certain Department of Agriculture programs); 18 U.S.C. 1158 (Indian crafts); 22 U.S.C. 1980(g) (compensation for commercial fishing vessels); 22 U.S.C. 2197(n) (Overseas Private Investment Corporation); 30 U.S.C. 941 (black lung benefits); 33 U.S.C. 931 (longshore and harbor workers' compensation); 42 U.S.C. 3220 (certain economic development funds administered by the Secretary of Commerce).

It is true that, in light of the requirement of proving a "purpose of influencing" the covered institution, few, if any, indictments are likely to be brought under Section 1014 unless the statement made or fact concealed was actually materially false. Nevertheless, it is axiomatic that the decisions of juries are unpredictable. Conditioning a conviction on the jury's having found the existence of an extraneous element heightens the chances that, solely as a result of speculation or confusion regarding that extra element, a jury will not return a verdict of guilty that it otherwise regards as warranted. The addition of a materiality element in cases brought under Section 1014 poses a particular risk of such speculation or confusion, because jurors will usually have had personal experiences with financial and credit institutions. Despite a legal standard that focuses inquiry on whether the false statement had "a natural tendency to influence" a decision of the financial institution, *Gaudin*, 115 S. Ct. at 2313, defense lawyers may be able to mislead jurors to inquire, based on their own experiences, whether the bank's action on the particular loan application or other submission at issue would in fact have been any different absent the falsehood.

The decision below can also be expected to prolong trials in which a defendant is charged with violating Section 1014, because, in order to minimize the possibility that the jury will find a statement to have been immaterially false, the government will often be

required to offer otherwise unnecessary evidence at trial as to why the false statement was material. Such evidence might include testimony about the practices of the financial or credit institution that received the false statement, or about the practices of such institutions in general. In some cases, the defense can be expected to challenge such testimony, either through cross-examination or by presenting its own evidence. While it is appropriate to expect the government to produce and defend evidence of materiality where a defendant is charged with an offenses for which materiality is an element, it is unnecessary and injurious to the interest of justice to impose such a burden where Congress has not made materiality an element of the offense. And, because a jury's acquittal of a defendant is insulated from appellate review under the Double Jeopardy Clause, the government will no longer have the opportunity to obtain appellate review if the issue of materiality is resolved against the government by the trier of fact.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1996

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 93-3924, 93-3932, and 94-1031

UNITED STATES OF AMERICA, APPELLEE,

v.

JERRY E. WELLS, APPELLANT,

UNITED STATES OF AMERICA, APPELLEE,

v.

KENNETH R. STEELE, APPELLANT,

UNITED STATES OF AMERICA,
APPELLANT/CROSS-APPELLEE,

v.

JERRY E. WELLS, APPELLEE/CROSS-APPELLANT,
UNITED STATES OF AMERICA,
APPELLEE/CROSS-APPELLANT,

v.

KENNETH R. STEELE, APPELLANT/CROSS-APPELLEE*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

[Filed Aug. 21, 1995]

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* The HONORABLE MICHAEL J. MELLOY, Chief United States District Judge for the Northern District of Iowa, sitting by designation.

Before MORRIS S. ARNOLD, Circuit Judge, JOHN R. GIBSON, Senior Circuit Judge, and MELLOY,* Chief District Judge.

MELLOY, Chief District Judge.

Appellants, Jerry E. Wells and Kenneth R. Steele, were tried on one count of conspiracy to make material false statements and three counts of making material false statements to federally insured financial institutions, in violation of 18 U.S.C. §§ 371 and 1014. The court granted judgment of acquittal as to two counts of making material false statements. The appellants were ultimately convicted of the one count of conspiracy and one count of making a material false statement. The defendants appeal their conviction on Counts I (conspiracy) and II (making false statements). The United States of America cross-appeals, alleging errors by the court at sentencing. We vacate the defendants' convictions and remand to the district court for re-trial.

I. Background

The charges against the appellants relate to the appellants' roles in obtaining financing for their jointly owned business, Copytech Systems, Inc. Copytech, previously known as Doss Office Systems, Inc., was in the business of leasing and servicing copier equipment. At all times relevant to the charged crimes, Copytech was owned by three business associates, the defendants Wells and Steele, and

* The HONORABLE MICHAEL J. MELLOY, Chief United States District Judge for the Northern District of Iowa, sitting by designation.

convicted co-conspirator, Mr. Jim Russell.[1] Defendant Wells was an attorney who provided legal services to Doss Office Systems, Inc. before Wells, Steele and Russell purchased it in May 1986. In 1986, the prior owner of the business approached Wells and Steele[2] with an offer to sell the company. Wells and Steele then invited Russell to purchase a share of Doss Office Systems. In May 1986, Wells and Steele's holding company, W & S Holding Company, Inc. (formed specifically for the purpose of purchasing Doss), purchased a two-thirds share of Doss, and Russell purchased the remaining one-third share. The company's name changed from Doss Office Systems to Copytech in 1987.

When Wells, Steele and Russell purchased Copytech, they inherited a company beset by financial trouble. They assumed, in addition to a serious cash flow problem, responsibility for over $8 million in debt. To remedy the cash shortage, Copytech obtained financing through the assignment of future lease payments from its customers' copier leases. Copytech would sell its rights to receive the future lease payments to a financial institution for cash. The leases were sold for a lump sum payment equal to the present value of the sixty-month lease income streams, discounted to yield the bank a 13%-15% profit.

[1] Before the appellants' trial, Mr. Russell pled guilty, pursuant to a plea agreement, to one count of conspiring with the appellants, and to three counts of making false statements.

[2] Defendant Steele had participated in previous business ventures with Mr. Wells.

Count I charged the defendants with conspiring to make material false statements to the banks providing such financing, and Count II alleged one instance of making material false statements to one of the banks. Specifically, the charges relate to sales of Copytech's interest in a particular form of lease/service agreement known as Copier Management Program (CMP) leases.

Under the CMP program, Copytech leased copier equipment and provided service and supplies for the leased equipment for one monthly lease/service fee. The CMP monthly lease payments were structured to cover both the fixed cost of providing the copiers and the variable cost of servicing the copiers ("soft costs"). The sale agreements under which Copytech sold its interest in the CMP leases provided for the assignment of Copytech's interest in the leases' income streams to the participating banks, but not the assignment of Copytech's obligations under the CMP leases. Copytech retained the obligation to pay the "soft costs" as the costs were incurred.

When the three Copytech owners purchased Copytech, the company had two established sources of funding: Boatmen's Bank of Kansas City and First State Bank of Joplin. Boatmen's Bank required Copytech to maintain a cash reserve account, equal to 15% of the value of the lease contracts, to cover the "soft" service costs in the event of a customer's default on monthly payments, or in case Copytech went out of business. In the face of overdrafts at First State Bank, however, Copytech moved its portfolio from Boatmen's to First State. By moving its money, it freed the reserve account and was able to apply the

$500,000 reserve balance to cover its First State overdrafts.

In late 1986 or early 1987, Norwest Bank offered to purchase CMP contracts from Copytech. Because Norwest was aware of the dual lease/service nature of the CMP contracts and Copytech's service obligation under the contracts, it required Copytech to maintain a cash reserve account similar to the account that Boatmen's Bank had required. Copytech turned down Norwest's offer because it needed more money up front and did not want to tie up cash in a reserve account.

The conspiracy charges allege that the conspiracy began after the Norwest experience. After turning down Norwest's offer to purchase CMP contracts, Copytech's owners agreed to misrepresent their service obligations in order to avoid the requirement of maintaining a reserve account. To that end, Copytech altered the language in the CMP lease contracts. The original CMP contract language stated that the lessor (Copytech) was solely responsible for installation and maintenance of the equipment. The revised CMP contract contained the following language:

> Lessee (customer) will keep the leased equipment in good repair and first-class mechanical condition without cost or liability to the lessor ([Copytech])
>
> . . . .
>
> This lease constitutes the entire agreement of the parties with respect to the subject matter thereof; may not be changed or modified except in writing

. . . . This lease may only be modified, extended or renewed by a writing signed by the parties hereto.

Although this language expressly states that Copytech does not have any responsibility to service the copiers, revised CMP contracts were executed in conjunction with CMP service addenda shifting the responsibility for servicing the leased copy equipment back onto Copytech. Copytech would then send the CMP leases to its funding sources without including the CMP addenda. By withholding the service addenda from the financial institutions, Copytech was able to hide the service and maintenance obligation and obtain funding without being required to maintain cash reserves to cover service costs.

At the close of evidence, the court entered judgment of acquittal as to Counts III and IV, each alleging the making of a false statement to Bank IV. The only Counts submitted to the jury were Count I, conspiracy to make false statements, and Count II, making a false statement to O'Bannon Bank.

Count I alleged a conspiracy to make material false statements, in violation of 18 U.S.C. § 1014, by omitting any reference to the hidden service costs of CMP contracts. The defendants argue that the omission of information cannot constitute a false statement, that the information on the contract was not technically "false" because the information supplied was literally true, and that in any case, the omission was not material to the transaction. Count II alleged that the defendants made material false statements to O'Bannon Bank by submitting unconditional personal

guaranties bearing the signatures of the defendants' wives, knowing full well that they had forged the signatures of their wives. The defendants admit that they had signed their wives' signatures, but maintain that the signatures do not constitute "false" statements because they had the authority, or at least a good faith belief that they had the authority, to sign their spouses' names to the loan guarantees. They also argue that their spouses' loan guarantees were not material to the transactions.

II. Trial Errors

The appellants raise several issues on appeal. They claim that the evidence produced at trial was insufficient to prove guilt beyond a reasonable doubt on each element of both Counts I and II, that Count I failed to allege a violation of 18 U.S.C. § 1014, and that the court erred in excluding certain expert evidence introduced by the defense and in failing to give a multiple conspiracy instruction as to Count I. In addition, the appellants argue that the court erred in determining the "materiality" of the charged material false statements as a matter of law rather than submitting the issue to the jury.[3] Based on

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[3] The appellants raised the issue of failure to submit materiality to the jury during trial and preserved error on this issue. Appellants also raised the issue in their motion for a new trial. We address this issue despite the fact that it was not raised directly in the appellants' brief on appeal. Under past Eighth Circuit law, the element of materiality in a prosecution for violation of a statute like 1014 was clearly a question for the judge. During the pendency of this appeal, however, the issue has been revived in light of the Supreme Court's recent opinion in *Gaudin v. United States*, — U.S. ——, 115 S.Ct. 2310 (1995). Because the defendants did not waive this issue and the

these claimed errors, the appellants request entry of judgment of acquittal or reversal of the convictions and remand for new trial.

A. Judicial Determination of Materiality:

The defendants were convicted of conspiring to make false statements and making false statements for the purpose of influencing a federally insured banking institution, in violation of 18 U.S.C. §§ 371 and 1014. The trial court required the government to prove the materiality of the false statements charged under both counts I and II as an element of proving both §§ 371 and 1014. The materiality issue was hotly disputed; however, the trial judge determined that the statements were material as a matter of law and instructed the jury that they were not to deliberate on the issue of materiality. The appellants argue that removing the question of materiality from the jury violated their constitutional right to have a jury decide each element of the charged crimes.[4]

The Fifth Amendment right to due process of the law and the Sixth Amendment right to a jury trial, together, mandate that a jury must determine every element of the crime with which a defendant is

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appellees acknowledge that the issue was raised, at least peripherally on appeal, we address the issue here. We did request and receive supplemental briefs after the *Gaudin* decision on this issue.

[4] The trial judge was of the opinion that the issue of materiality should be submitted to the jury. He stated: ". . . I really think it's a jury issue as to whether the representations were material or not material." Tr. 1737. He went on to state, however, that controlling Eighth Circuit law required him to decide the issue as a matter of law.

charged. *United States v. Gaudin*, —U.S.——, 115 S.Ct. 2310 (1995). Where a criminal statute requires proof of the "materiality" of a false statement as an element of a crime, a defendant's right to a jury trial is violated when the court removes consideration of that element from the jury and determines materiality as a matter of law. *Id.* at 2320.

In *Gaudin*, the defendant had been convicted of violating the false statement portion of 18 U.S.C. § 1001, which like § 1014, does not explicitly list materiality as an element of the crime. *Id.* at 2313. At trial, the district court instructed the jury that the charged false statements were material as a matter of law. On appeal, the Ninth Circuit Court of Appeals reversed the conviction based on Ninth Circuit precedents dictating that materiality be determined by a jury. The Supreme Court granted certiorari to resolve a split among the circuits on the question of whether the "materiality" of false statements is a matter for the judge to decide or an element of the crime to be submitted to a jury.

The Supreme Court held that, "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Id.* at 2320. Because it was uncontested that a conviction under the false statement prong of § 1001 required proof that the statements be "material", the court affirmed the Ninth Circuit decision reversing the conviction on the basis of the trial court's improperly removing consideration of materiality from the jury. *Id.*

In the instant case, the appellants argue that "materiality" is an essential element of proving a violation of 18 U.S.C. § 1014 and that judicial determination of materiality at trial violated their constitutional right to trial by jury. The government counters that since 18 U.S.C. § 1014 does not explicitly include the term materiality in its definition of the crime,[5] materiality is not an element of the crime in the sense that judicial determination of materiality would violate a defendant's constitutional right to have a jury decide each element of a charged crime. Since all of the parties acknowledge that the court removed the question of materiality from the jury, we must resolve the issue of whether materiality is an element of proving a charge of making a false statement in violation of 18 U.S.C. § 1014.

With respect to similar fraud statutes, which like § 1014 do not explicitly list materiality in the definition of the crime, this court has held that materiality is an element of proof. *See United States v. Adler*, 623 F.2d 1287 (8th Cir. 1980). In *Adler*, the defendant had been convicted on fourteen counts of willfully and knowingly making false statements on

[5] 18 U.S.C. § 1014 states that: "[w]hoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same . . . shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

claims submitted under the Medicaid and Medicare programs in violation of 18 U.S.C. § 1001 and four counts of willfully and knowingly making false claims under the same programs in violation of 18 U.S.C. § 287. Although neither statute lists materiality as an element of the crime,[6] this court held that materiality is an essential element of both statutes. *Adler*, 623 F.2d at 1291 n.5.

With respect to the § 1001 charge in *Adler*, this court stated, "[a]lthough 28 [sic] U.S.C. § 1001 on its face does not limit its coverage to those false statements which are material, it has been well established that materiality of the statement is an element of a violation of 18 U.S.C. § 1001. *United States v. Voorhees*, 593 F.2d 346 (8th Cir.), cert. denied, 441 U.S. 936, 99 S.Ct. 2061 (1979)." *Id.* at 1291. In regard to the § 287 charge, the court found that "[n]either appellant nor the government distinguishes between 18 U.S.C. § 1001 and 18 U.S.C. § 287 as far as the

[6] 18 U.S.C. § 1001 provides: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. § 287 provides: "Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

requirement of a showing that the false claim or false statement involved is material. Accordingly, we treat materiality as an essential element of both statutes. We see no reason to treat the statutes differently." *Id.* n.5.

Like 18 U.S.C. § 1001, the statute at issue in *Adler*, the statute at issue in this case, 18 U.S.C. § 1014, on its face does not limit its coverage to those false statements which are material. However, it has been well established that materiality of the statement is an element of a violation of 18 U.S.C. § 1014. *See United States v. Concemi*, 957 F.2d 942, 951 (1st Cir.); *United States v. Ryan*, 828 F.2d 1010, 1014 n.1 (3d Cir.); *United States v. Bonnette*, 663 F.2d 495, 496 (4th Cir.); *United States v. Thompson*, 811 F.2d 841, 843 (5th Cir.); *United States v. Spears*, 49 F.3d 1136 (6th Cir. 1995); *Theron v. United States Marshal*, 832 F.2d 492, 496 (9th Cir. 1987); *United States v. Smith*, 838 F.2d 436, 439 (10th Cir. 1988); *United States v. Rapp*, 871 F.2d 957, 964 (11th Cir. 1989). We see no reason to treat § 1014 any differently from the similarly worded §§ 287 and 1001. Therefore, we explicitly adopt the rule we have implicitly acknowledged before, that the "materiality" of a false statement is an element of proving a violation of § 1014. *See United States v. Ribaste*, 905 F.2d 1140 (8th Cir. 1990); *see also United States v. Garfinkle*, 29 F.3d 1253, 1256 (8th Cir. 1994); *United States v. McKnight*, 771 F.2d 388 (8th Cir. 1985); *United States v. Habib*, 594 F.2d 1215, 1216 (8th Cir. 1979) (defendants charged with making statements that were materially false under § 1014), *and see also*, *United States v. Mallen*, 843 F.2d 1096, 1102 (8th Cir. 1987); *United States v. Reeves* 674 F.2d 739, 747 (8th

Cir. 1982); *United States v. Segal*, 649 F.2d 599 (8th Cir. 1981) (indictments in § 1014 prosecutions alleged material false statements).

While conceding that most courts require proof of materiality to support a conviction under § 1014, the government argues that courts impose the requirement of proving materiality to exclude trifles from its coverage not as a statutorily required element of the crime. *See United States v. Corsino*, 812 F.2d 26, 30 (1st Cir. 1987); *see also Hughes v. United States*, 899 F.2d 1495 (6th Cir. 1990); *United States v. Keefer*, 799 F.2d 1115 (6th Cir. 1986); *United States v. Abadi*, 706 F.2d 178 (6th Cir. 1983); *United States v. Beer*, 518 F.2d 168, 170 (5th Cir. 1975). In *Beer*, for example, the court stated that:

> "[w]hen dealing with a pervasive, all-encompassing statute, however, the courts must be extremely careful to insure that reasonable limits are observed. This is merely a restatement of the canon of construction that criminal statutes are to be strictly construed. [citations omitted] In order to exclude 'trivial' falsehoods from the purview of the statute, the courts have read a requirement of materiality into its second clause . . . ."

Beer, 518 F.2d at 171. The fact that courts resort to canons of statutory construction to determine that statutes like § 1014 require proof of materiality, however, does not alter our conclusion that proof of materiality is a statutorily required element of the crime.

The primary objective of statutory construction is to determine legislative intent. *United States v.*

Jones, 811 F.2d 444, 447 (8th Cir. 1987). While it is the function of the legislature to make the laws, it is the function of the courts to finally and authoritatively interpret what the law says. *Sutherland Stat. Const.* § 45.03 (5th Ed). In this case, we construe § 1014 to require proof of the materiality of a false statement.

Because the statute requires proof of the materiality of a false statement, materiality is an element of § 1014. *Gaudin*, therefore, dictates that we vacate the defendants' convictions on both counts I and II and remand the case to the district court for retrial. The trial court's determination of materiality as a matter of law denied the defendants' constitutional right to have a jury determine each and every element of a charged crime, including the materiality of a false statement charged under § 1014 and under the § 371 charge of a conspiracy to violate § 1014.

B. Violation of 18 U.S.C. § 1014 — Count I

The appellants argue that Count I does not allege a violation of 18 U.S.C. § 1014 and that the court erred in not granting their motions for judgment of acquittal, arrest of judgment, and new trial. Since we are remanding for a new trial because of *Gaudin*, we need only address the judgment of acquittal and arrest of judgment issues.

Count I alleges a conspiracy to make false statements to financial institutions by agreement to avoid telling the banks about Copytech's financial responsibility to service the copiers under the CMP contracts. The appellants claim that withholding

information cannot support a conviction under § 1014, only affirmative assertions of facts can. We disagree.

Other courts have broadly interpreted § 1014 to cover various types of acts and misrepresentations as statements. *See, e.g., United States v. Haddock*, 956 F.2d 1534 (10th Cir. 1992) (evidence that defendant failed to disclose line of credit sufficient to convict under § 1014); *United States v. Trexler*, 474 F.2d 369, 370-71 (5th Cir.) (in a § 1014 prosecution, the jury could consider what "a defendant does or fails to do", it is not limited to affirmative acts); *United States v. Sackett*, 598 F.2d 739, 740-42 (2d Cir. 1979) (in § 1014 prosecution, there was sufficient evidence for the jury to convict for omitting information orally on loan application); *United States v. Trice*, 823 F.2d 80 (5th Cir. 1987) (failure to disclose material information needed to avoid deception in connection with loan transactions covered by § 1014 constitutes a false statement or report within the meaning of the statute and thus violates the statute); *United States v. Ryan*, 828 F.2d 1010, 1017 (3d Cir. 1987) (fact that a word was not spoken or written does not necessarily mean that a message was not sent and received; under § 1014 a statement included assertive "nonverbal conduct"); *United States v. Concemi*, 957 F.2d 942, 959-61 (1st Cir. 1992) (HUD-1 certificates which omit information about second mortgage constitute "statement" for § 1014 purposes).

Likewise, in construing a similar statute, we have recognized that an omission in a § 1005 prosecution can constitute a "false entry" where an honest entry would otherwise be made. *See United States v. Copple*, 827 F.2d 1182, 1187 (8th Cir. 1987). The defendant in *Copple* was prosecuted under 18 U.S.C.

§ 1005 for making false entries in a bank book, report or statement. The defendant argued that the evidence was not sufficient to support a § 1005 charge because there could not have been a false entry made where the false documents were withheld, rather than entered. We held, *citing United States v. Dougherty*, 763 F.2d 970, 973 (8th Cir. 1985), that an omission could constitute a false entry, where an honest entry would otherwise be made.

In this case, Count I charges that the appellants conspired to violate § 1014 by knowingly omitting material information for the purpose of influencing federally insured financial institutions. As in *Copple*, such omissions may constitute a false statement where honest statements would otherwise be made. The literal truth of information that is actually submitted does not shield the intentional omission of material information from prosecution under § 1014. The allegations contained in Count I of the indictment are sufficient to allege a violation of 18 U.S.C. § 1014.

C. Sufficiency of Evidence

The defendants argue that the evidence produced at trial, as to both Counts I and II, was legally insufficient to prove guilt beyond a reasonable doubt as to each and every element of both counts. As to Count I, the defendants claim that the evidence does not support a finding that they intended to influence the banks. As to Count II, they argue that the evidence does not support a finding that they did not have the authority to sign their wives signatures. As to both counts, they claim that the evidence does not support a finding that the false statements were "material".

Consequently, they claim that the Court violated their Fifth Amendment right to due process by denying their motions for judgment of acquittal, arrest of judgment and new trial. Again, since we are remanding for a new trial on other grounds, we need only address whether the motion for judgment of acquittal or arrest of judgment should have been granted.

In reviewing the denial of a motion for judgment of acquittal, the evidence is viewed in the light most favorable to the government, resolving evidentiary conflicts in favor of the government, and accepting as established all reasonable inferences which may be logically drawn from the evidence. *United States v. Springer*, 831 F.2d 781, 783-84 (8th Cir. 1987), *cert. denied*, 485 U.S. 938 (1988); *United States v. Rodriguez*, 812 F.2d 414, 416 (8th Cir. 1987). A motion for judgment of acquittal should be granted only where the evidence is such that a reasonably minded jury must have a reasonable doubt as to the existence of one of the essential elements of the crime charged. The court can neither weigh the evidence nor assess the credibility of the witnesses. *Burks v. United States*, 437 U.S. 1, 16 (1978). Determining the credibility of witnesses is the jury's function.

Application of that standard to the record in this case leads us to the conclusion that there was more than sufficient evidence to support each defendant's conviction on each element of both Counts I and II. Mr. Russell, the third co-defendant in this case testified against both Wells and Steele on each count. Since his testimony is not incredible or insubstantial on its face, it is sufficient to sustain a conviction on both counts. *See United States v. Drews*, 877 F.2d 10,

13 (8th Cir. 1989) (The uncorroborated testimony of an accomplice is sufficient to sustain a conviction if the testimony is not incredible or insubstantial on its face.). In addition, the evidence of the timing of the evolution of the CMP contract language supports an inference of intent as to Count I. Evidence that the defendants did not sign their own wives' names to the loan guarantees supports both an inference that they did not have the authority to sign their wives names as they claim and that they intended to submit false signatures and influence the bank.

The defendants argue that neither the withholding of the information alleged in Count I nor their wives' signatures on personal loan guarantees were material because there was some evidence that bank officers would not have relied on the information. Reliance, however, is not necessary to make out a violation of § 1014. *United States v. Copple*, 827 F.2d 1182, 1187 (8th Cir. 1987). The crime is one of subjective intent, it is enough that the statement has the capacity of influencing the financial institution. *United States v. Glassey*, 715 F.2d 352 (7th Cir. 1983); *United States v. Bonnette*, 663 F.2d 495 (4th Cir. 1981). In this case, the evidence that Boatmen's and Norwest required reserve accounts as a precondition to financing the CMP leases is sufficient to support a finding that the withheld information was material, or in other words, had the capacity to influence the financial institutions. The fact that O'Bannon Bank asked the defendants to have their wives sign unconditional loan guarantees supports a reasonable inference that personal loan guarantees from the defendants' spouses would have the capacity of influencing the bank.

D. Expert Testimony

The defendants also challenge the court's exclusion of expert testimony on the issues of whether the revised copier lease contracts and their coordinate CMP addenda were, together, part of the same lease and whether the false statements were material. As the expert's proffered testimony amounted to instructing the jury on the law, the court's exclusion of the evidence was not manifestly erroneous. *See, e.g., Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988), *cert. denied*, 488 U.S. 1008 (1989); *United States v. DiDomenico*, 985 F.2d 1159, 1164 (2d Cir. 1993) (instruction on the law is the function of the court, not a defense expert). We do not reach the question of whether the court's refusal to admit expert evidence on the issue of materiality was erroneous because we are remanding the case for retrial on other grounds. However, we note that the admissibility of expert evidence on the issue of the materiality of false statements should be determined in light of our holding above that materiality is an issue for the jury.

III. Multiple Conspiracy and Sentencing Errors

Appellants appeal the trial court's decision to not give a multiple conspiracy instruction. Because we reverse the defendants' convictions and remand for new trial, we do not reach the issue of whether the evidence at a new trial will require a multiple conspiracy instruction. Likewise, we do not decide the sentencing issues raised by the government in its cross-appeal.

IV. Conclusion

We hold that proof of the materiality of an alleged false statement is required as an element of proving a violation of 18 U.S.C. § 1014. The trial court in this case denied the appellants' constitutional right to have a jury deliberate on each and every element of proof of the charged crimes by instructing the jury that they were not to deliberate on the materiality of the false statements underlying both Counts I and II because the statements were material as a matter of law. Since the evidence was otherwise sufficient to support a conviction and overcome the defendants' motions for judgment of acquittal, we vacate the convictions and remand to the district court for retrial consistent with this order.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 93-3924, 93-3932, and 94-1031

UNITED STATES OF AMERICA, APPELLEE,

v.

JERRY E. WELLS, ET AL., APPELLANTS,

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 2, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals , Eighth Circuit

APPENDIX C

INSTRUCTION NO. 20

The crime of making a false statement to a bank as charged in Count Two of the Indictment has three essential elements which are:

First: That O'Bannon Bank was federally insured;

Second: That the defendant knowingly made or caused to be made a false statement to the bank, that is, by submitting the forged unconditional personal guaranties of their spouses;

Third: That the defendants did so for the purpose of convincing the bank to purchase lease contracts.

It is not necessary, however, to prove that the institution involved was, in fact, influenced or misled. What must be proven is that the defendant intended to influence the bank by the false statement.

A statement or representation is "false" when it is untrue when made or effectively conceals a material fact. A material fact is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction.

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake or accident. The government is not required to prove that the defendant knew that his acts or omissions were unlawful. You make consider evi-dence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

The materiality of the statement or representation alleged to be false or concealed is not a matter with which you are concerned and should not be considered

by you in determining the guilt or innocence of the defendant.

To make a false statement to a federally insured bank, the defendant need not directly submit the false statement to the institution. It is sufficient if the defendant submits the statement to a third party knowing that the third party will submit the false statement to the federally insured bank.

For you to find a defendant guilty of the crime charged under Count Two, the government must prove all of the essential elements beyond a reasonable doubt as to that defendant; otherwise you must find that particular defendant not guilty of this crime under Count Two.